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Before the
FCC MAIL SECTION
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-312
31630

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In re Applications of)	MM DOCKET NO. 93-37 ✓
)	
LEHIGH VALLEY COMMUNITY BROADCASTERS)	File No. BPED-891019MF
ASSOCIATION, INC.)	
Channel 207A)	
Allentown, Pennsylvania)	
)	
BEACON BROADCASTING CORPORATION)	File No. BPED-900905ML
Channel 207A)	
Allentown, Pennsylvania)	
)	
For Construction Permit for a New)	
Noncommercial Educational FM Station)	

MEMORANDUM OPINION AND ORDER

Issued: May 26, 1993

Released: May 28, 1993

1. On April 14, 1993, Lehigh Valley Community Broadcasters Association, Inc. (Lehigh), and Beacon Broadcasting Corporation (Beacon) filed a Joint Motion for Approval of Settlement Agreement (Joint Motion). In related filings, on April 14, 1993, Lehigh submitted a Motion for Summary Decision, and on April 15, 1993, Lehigh tendered a Petition for Leave to Amend its application. On April 28, 1993, the Mass Media Bureau filed consolidated comments.

2. The Joint Motion is accompanied by a settlement agreement which contemplates the grant of the Lehigh application, as amended, and the grant of the Beacon application, as originally filed. Lehigh proposes to amend its application by, among other things, specifying operation on Channel 201 in lieu of 207, thus removing the mutual exclusivity with Beacon. In consideration for Lehigh's agreement to amend its application, Beacon will pay Lehigh 1/2 of Lehigh's documented legitimate and prudent engineering costs, up to a total of \$2,000, associated with the preparation and filing of the amendment and any related documents.

3. Lehigh and Beacon state that the settlement agreement would serve the public interest by hastening the inauguration of two new noncommercial educational FM services in Allentown, Pennsylvania. Both applicants also declare under penalty of perjury that their respective applications were not filed for the purpose of reaching or carrying out a settlement.

4. The Joint Motion satisfies the requirements of § 73.3525 of the Commission's Rules, which implements § 311(c)(3) of the Communications Act of 1934, as amended. Specifically, a copy of the settlement agreement has been timely filed, and the applicants have established that approval of the agreement

¹ The Hearing Designation Order, DA 93-154 (released March 9, 1993) (HDO), inadvertently identified the applicant as "Lehigh Valley Community Broadcasters Board of Directors."

would serve the public interest and that neither application was filed for an improper purpose.

5. Furthermore, based on an analysis by its technical staff, the Bureau concludes that Lehigh's amendment, which specifies a new channel and modifies the height above average terrain and effective radiated power of Lehigh's new station, complies with all relevant Commission rules. Good cause has been shown for acceptance of the amendment inasmuch as the amendment is an integral part of the universal settlement package.

6. Lehigh also seeks summary decision in its favor of a financial issue that was specified in the Hearing Designation Order, DA 93-154 (released March 9, 1993). Lehigh argues that the financial issue should not have been designated because Lehigh's application is contingent upon receipt of a grant from the National Telecommunications and Information Administration (NTIA). As such, according to Lehigh, its application is grantable, subject to an appropriate condition requiring Lehigh to report to the Commission within a reasonable time that the proposed NTIA funding has been received. See KOED, Inc., 5 FCC Rcd 1784, 1785 (1990 (KOED, Inc.)).

7. The Presiding Judge agrees with the Bureau that Lehigh's request for summary decision is more akin to a motion to delete. Summary decision is appropriate where there is no genuine issue of material fact for determination at hearing. See § 1.251(a). On the other hand, deletion of an issue is appropriate where the issue was specified in error. See Muncie Broadcasting Corp., 89 FCC 2d 123 (Rev. Bd. 1982); Midwest St. Louis, Inc., 63 FCC 2d 262 (Rev. Bd. 1976); Centreville Broadcasting, 21 RR 2d 216 (Rev. Bd. 1971).

8. In the instant case, Lehigh does not claim that it is now financially qualified because it has received a grant from NTIA. Rather, Lehigh argues that the HDO erred by specifying the financial issue in the first place. Thus, although Lehigh has characterized its pleading as a motion for summary decision, it is, for all intents and purposes, a request to delete the financial issue.

9. The financial issue will be deleted notwithstanding the motion was filed more than 30 days after release of the HDO. See § 1.229(b)(1) of the Commission's Rules. Pursuant to KOED, Inc., a noncommercial applicant need not show that it has obtained NTIA funding as a prerequisite to grant of a construction permit. Since Lehigh's proposal is contingent upon receipt of an NTIA grant, and the Commission has determined that the application may be granted prior to receipt of such funding, the financial issue should never have been specified against Lehigh. Accordingly, deletion of the financial issue is warranted in this instance.

10. The only remaining matter requiring resolution concerns the contingent environmental issues pending against Lehigh and Beacon. By letter dated April 30, 1993, the Bureau's Audio Services Division advised that it had reviewed Beacon's amendment submitted pursuant to Section 73.3522(b) of the Rules. It concluded that the contingent environmental issue specified against Beacon be eliminated from the HDO subject to the imposition of a condition to assure worker safety. The issue will be deleted and the recommended condition

will be imposed.² Also, by letter of May 12, 1993, the Audio Services Division advised that it had examined Lehigh's amendment and concluded that the information satisfies the requirements of Section 1.1311 of the Rules. The contingent environmental issue specified against Lehigh will be deleted.

Accordingly, IT IS ORDERED, That the "Petition For Leave To Amend And Amendment" filed by Lehigh Valley Community Broadcasters Association IS GRANTED and the amendment specifying operation on Channel 201 in lieu of 207 IS ACCEPTED.

IT IS FURTHER ORDERED, That the "Motion For Summary Decision" filed April 14, 1993 by Lehigh Valley Community Broadcasters Association IS DISMISSED as moot; and in lieu thereof the financial issue specified against Lehigh Valley Community Broadcasters Association IS DELETED.

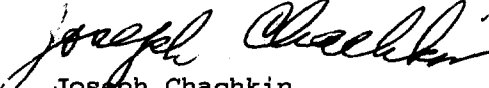
IT IS FURTHER ORDERED, That the contingent environment issues against Lehigh Valley Community Broadcasters Association and Beacon Broadcasting Corporation ARE DELETED.

IT IS FURTHER ORDERED, That the "Joint Motion For Approval Of Settlement Agreement" filed April 14, 1993 IS GRANTED; the settlement agreement IS APPROVED; the application of Lehigh Valley Community Broadcasters Association IS GRANTED; and the application of Beacon Broadcasting Corporation IS GRANTED subject to the following condition:

The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines.

IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION


Joseph Chachkin
Administrative Law Judge

² By letter dated May 14, 1993, counsel for Beacon stated that Beacon had no objection to grant of its construction permit subject to the recommended condition.